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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1096

THE NEZ PERCE TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.

F. M. GOODWIN,
LAWRENCE CAKE,
C. C. DILL,
G. W. JEWETT,
ERNEST L. WILKINSON,
Counsel for Petitioner.



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vs. *Petitioner,*
THE UNITED STATES.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Nez Perce Tribe of Indians, by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled cause on October 6, 1941, as to the issue hereinafter set forth.

Opinion Below.

The opinion of the Court of Claims (R. 16) is as yet unreported.

Jurisdiction.

The judgment of the Court of Claims was entered October 6, 1941 (R. 22). A motion for a new trial was thereafter filed and entertained and was overruled January 5, 1942 (R. 23). The jurisdiction of this Court is invoked

under §3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, Title 28 U. S. C., §288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, and the Act of February 20, 1929, c. 275, 45 Stat. 1249, §1. The last-cited act is the jurisdictional act under which this suit was prosecuted.¹

The judgment, review of which is sought, is a determination under Rule 39(a) of the court below²; and while interlocutory in form is subject to review by this Court under the terms of §3(b) of the Act of February 13, 1925, *supra*, providing for review on certiorari of "any case" in the Court of Claims—without provision that the judgment shall be final. *United States v. Esnault-Pelterie*, 299 U. S. 201, 202-3 and note 3. In the case cited—a precisely similar situation involving patent litigation (the statute providing for appeal from interlocutory decrees as to validity and infringement in patent cases being inapplicable to the Court of Claims), the rule of the Court of Claims made provision for interlocutory determination of validity and infringement; and despite the non-final judgment of the Court of Claims this Court found jurisdiction to review the judgment. Furthermore, in the present case, the opin-

¹ The special jurisdictional act provides, *op. cit.*, that jurisdiction is conferred on the Court of Claims "with the right of appeal by either party to the Supreme Court of the United States" etc. Notwithstanding this statute was enacted subsequent to the Act of February 13, 1925, cited in the text, it is believed that certiorari and not appeal is the proper mode of review. See *Robertson & Kirkham, Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47, citing *Klamath & Moadoc Tribes of Indians v. United States*, 296 U. S. 244, 245-246.

² That rule provides that in every Indian case, unless otherwise ordered, "the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

ion below, as to the matters herein sought to be reviewed, is final and conclusive of petitioner's rights. See *Clark v. Williard*, 292 U. S. 112-117-119.

Question Presented.

The question presented is whether the Nez Perce Tribe of Indians is entitled, under the terms and provisions of a treaty with the United States in 1855, to compensation from the United States for gold mined and removed by white men in trespass from lands in the tribal reservation created and established by such treaty, contrary to its express stipulations and prior to the Treaty of said Indians with the United States June 9, 1863, and its ratification April 17, 1867 (14 Stat. 467). The question involves the obligation of the United States, under said 1855 treaty provisions, to respond in damages for its failure or neglect or inability to protect and conserve the treaty tribal property of said Indians, and this in turn involves the liability of the United States under recognized rules of international treaty interpretation.

Statutes and Treaty Provisions Involved.

The particular provisions of the treaty of 1855 (12 Stat. 957), upon which the Indians rely, are those relating to the reservation lands set apart for their exclusive use and benefit from the area ceded by them to the United States, namely:

“Article 2. There is, however, reserved, from the lands above ceded, for the use and occupancy of the aforesaid confederated boundaries, to wit: * * * All of which tract shall be set apart * * * for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon said reservation without permission of the tribe and the superintendent and agent,” and

"Article 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof and pledge themselves to commit no depredations upon the property of such citizens."

Other statutes and treaties involved are set out in the appendix.

Statement.

The Act of February 20, 1929, 45 Stat. 1249, authorized the Nez Perce Tribe of Indians to sue the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, for an adjudication of "all legal and equitable claims of whatsoever nature" of the said tribe against the United States. Three particular claims were enumerated in said Act but only the one numbered "3" therein is involved in this petition, namely, a "claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian reservation lands in Idaho prior to the Treaty of June 9, 1863, and its approval or ratification by the Senate on April 17, 1867," (14 Stat. 647) (R. 2).

The said treaty of June 15, 1855, was entered into by the United States with said Nez Perce Tribe of Indians, who therein ceded a large area of land in territory later included in the State of Idaho, in consideration of certain money payments and in consideration of the creation within the area so ceded of the Nez Perce Indian reservation, with definite boundaries, "for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon said reservation without permission of the tribe and the superintendent and agent." The boundaries of the said reservation are shown on the

map marked exhibit "A" attached to the petition filed in the Court of Claims (R. 12A).

By the treaty of June 9, 1863, ratified April 17, 1867 (14 Stat. 647), the reservation established by said treaty of 1855 was further reduced by another cession by said Indians. This cession included the areas from which the gold in question was mined and removed, but no provision was made in said treaty of 1863 to compensate the Indians therefor (R. 6).

October 6, 1941, the Court of Claims made its special findings of fact, allowed recovery for certain claims but denied and disallowed the claim for gold mined and removed by white men without authority and in trespass from the reservation area established by said treaty of 1855 (R. 15). The two claims allowed, as shown by the record, were for small amounts (R. 16-17) and the offsets which the United States will doubtless claim under the jurisdictional act greatly exceed such amounts. Unless a recovery be had for the claim herein presented, counsel for petitioner feel that the "recovery" authorized by the court below will prove illusory.

The finding of fact of the Court of Claims as to the gold claim is numbered "7" and is as follows:

"7. In 1860 gold was discovered on lands alleged to be within the lands reserved by the treaty of 1855. White men undertook to locate camps thereon and to extract the gold. Some effort was made by the defendant to exclude them from the lands, but these efforts were unsuccessful. Several camps were established and a large quantity of gold was extracted before execution of the agreement of 1893 ceding to the defendant all unallotted lands, with certain reservations. These settlements were not made with the permission of the plaintiff tribe and the superintendent and agent." (R. 15.)

The Court of Claims held (R. 21) that

"Independent of treaty, the defendant as the sovereign power was under the duty of protecting the plaintiff in the peaceful occupation and possession of its property; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; but this duty, of course, goes no further than a duty to use its forces to endeavor to prevent a threatened wrong and to afford it redress in its courts against the wrongdoer if the wrong is committed * * *. We are satisfied that it was not intended by the treaty to impose on the defendant any greater duty to protect plaintiff in the peaceful occupation and possession of its property than already existed. Certainly there was not expressly assumed an obligation to respond in damages, if the protection afforded was inadequate; nor will such an obligation be implied unless such implication is inescapable. *Robinson v. Greenville*, 42 Ohio St. 625; *Western College v. Cleveland*, *supra*; *Gianfortone v. New Orleans*, *supra*. The treaty says that white persons shall not be permitted to reside on the reservation, but it does not say that if they do the United States shall be liable in damages for any injury done by them."

Specifications of Errors to be Urged.

The Court of Claims erred:

1. In holding that said treaty of 1855 was not intended to and did not impose on the United States a greater duty and obligation to protect and conserve the treaty property rights of the Nez Perce Indians than already existed independent of said treaty.
2. In holding that the United States, by entering into and assuming the obligations of said treaty of 1855, is not liable in damages to said Indians for its failure, neglect or inability to protect their treaty property, in the absence of consent on their part, from trespasses, depredations and damages by white men over whom the government and not the Indians has exclusive jurisdiction and control.

Reasons Relied On for Allowance of the Writ.

The case involves an important and fundamental issue of law as to Indian treaty property rights and the obligations of the United States to the Indians under treaties with them, specifically, whether a treaty of this kind with an Indian nation shall be accorded the same dignity, as to liability of the United States for unrestrained trespasses of its citizens, as is accorded treaties with foreign powers. The issue is of general importance to the Indian wards of the nation and it is one that has never been adjudicated by the Supreme Court of the United States.

Petitioner contends:

1. The property rights of the Nez Perce Tribe of Indians, under the Treaty of 1855 in question, embrace all the natural resources of the reservation thereby created for their exclusive use and benefit and this includes the gold in its treaty reservation lands.

United States v. Shoshone Tribe of Indians, 304 U. S. 111.

2. Treaties of the United States with Indian tribes are of the same dignity, carry the same obligations and create the same liabilities as treaties with foreign nations.

Worcester v. Georgia, 6 Pet. 515.

Holden v. Joy, 17 Wall. 211.

The Cherokee Tobacco case, 11 Wall. 616.

Attorney General Wirt, O. A. G. (1928), 110.

3. In international law a government is responsible in damages for its failure or neglect or inability to control the conduct of its citizens or subjects and for its failure or neglect or inability to punish them for offences and trespasses which they commit contrary to treaty stipulations.

Borchard, *Diplomatic Protection of Citizens Abroad*, p. 217;

Hall, *International Law* (7th ed.), sec. 65, ch. 4, part 2;

Pollock, *International Law*, p. 475;

Larabee Case, *Foreign Relations of the United States* (1904), p. 671;

Moore, *International Arbitration*, pp. 1663, 2968, 3091.

The following citations substantially state the international rules in this respect, namely:

"The responsibility of the State results from its neglect or inability to control the conduct of its subjects, or its neglect or inability to punish the offences and crimes which they commit. * * * So also the sovereign who refuses a reparation to be made of the damages done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury and becomes responsible for it." (Pollock, *International Law*, p. 475.)

"The liability of the Government of Honduras is believed to be fully established, however, on ground apart from the fact that a minor official of that government was directly concerned in the crime. While the State is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the State to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary damages." (Secretary of State Hay to American Minister to Honduras—*Foreign Relations of the United States*, 1904, p. 363.)

Respectfully submitted,

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APPENDIX.

Jurisdictional Act, Act of February 29, 1929, 45 Stat. 1249.

"That jurisdiction is hereby conferred on the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof, including all title, claim, or rights growing out of treaties of June 11, 1855 (Twelfth Statutes, Page 957), and June 9, 1863 (One hundred and forty-eighth Statutes, Page 673), and an agreement of May 1, 1893, approved by Act of Congress of August 15, 1894 (Twenty-eighth Statutes, page 286), with the said Nez Perce Tribe or bands of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho and Oregon, and more particularly as to the following claims: • • •

"3. Claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian Reservation lands in Idaho prior to the treaty of June 9, 1863, and its approval or ratification by the Senate on April 17, 1867 (Fourteenth Statutes, page 647), ceding such lands to the United States, such claim, in any event, not to exceed one-eighth of the amount of gold so mined and removed: Provided, That this Act shall not be construed as creating any rights which may be made the basis of a legal or equitable cause of action but shall only authorize the said Nez Perce Tribe of Indians to present to the United States Court of Claims for adjudication such legal rights and claims, if any, which may exist under the treaties and agreements mentioned in this Act.

Treaty of June 11, 1855, 12 Stat. 957.

Article 1. The Nez Perce Tribe of Indians hereby cede, relinquish and convey to the United States, all right, title

and interest in and to the country occupied or claimed by them, bounded * * *

Article 2. There is, however, reserved from the lands above ceded for the use and occupation of the said tribe * * * the tract of land included within the following boundaries * * * All which said tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty.

* * * * *

Article 8. The aforesaid tribe do hereby renew their acknowledgments of dependence upon the Government of the United States, their promises of friendship, and other pledges, as set forth in the eighth article of the treaty of June 11, 1855; and further, that all the provisions of said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly,—the same obligations resting upon the United States, the same privileges continued to the Indians outside of the U. S. as to right of way upon the streams and over the roads which may run through said reservation, as are therein set forth.

Treaty of June 9, 1863, 14 Stat. 647.

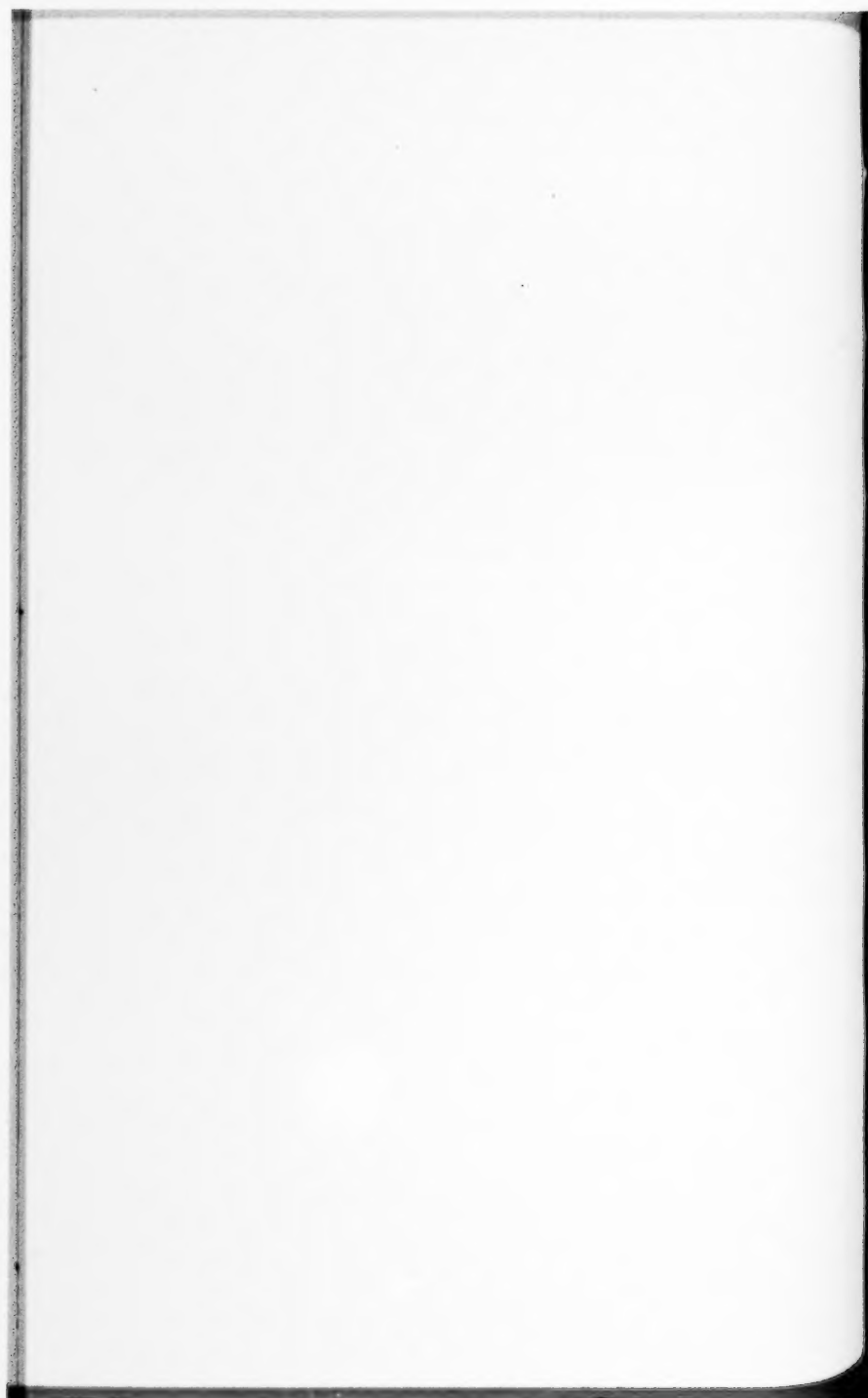
Article 1. The said Nez Perce tribe of Indians agree to relinquish, and do hereby relinquish, to the United States the lands heretofore reserved for the use and occupation of the said tribe, saving and excepting so much thereof as is described in Article II for a new reservation.

Article 2. The United States agrees to reserve for a home, and for the exclusive use and occupation of the said tribe, a tract of land * * *

Article 4. In consideration of the relinquishment herein made the United States agrees to pay to the said tribe, in addition to the annuities provided for in the treaty of June 11, 1855 * * * the sum of \$262,500. * * *

Article 8. It is also understood that the aforesaid tribe do hereby renew their acknowledgments of dependence upon the Government of the United States, their promises of friendship, and other pledges, as set forth in the eighth article of the treaty of June 11, 1855; and further, that all the provisions of said treaty which are not abrogated or specifically changed, by any article herein contained, shall remain the same to all intents and purposes as formerly,—the same obligations resting upon the United States, the same privileges continued to the Indians outside of the reservation, and the same rights of way upon the streams and over the roads which may run through said reservation, as are therein set forth.

(9672)



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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1096

THE NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 16-22) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered October 6, 1941 (R. 22-23). Motions for a new trial were overruled January 5, 1942 (R. 23). The petition for writ of certiorari was filed April 2, 1942. Jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended (28 U. S. C. sec. 288), and the Act of February 2, 1929, c. 275, 45 Stat. 1249.

QUESTION PRESENTED

Whether the provisions of the Nez Perce treaty of June 11, 1855, setting apart a reservation for the exclusive use of the tribe and declaring that no white man should reside there without permission constituted a guaranty on the part of the United States, running to the tribe, against any trespasses by white men upon the reservation.

STATUTE AND TREATY INVOLVED

Section 1 of the Act of February 20, 1929, c. 275, 45 Stat. 1249, provides:

That jurisdiction is hereby conferred on the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof, including all title, claim, or rights growing out of treaties of June 11, 1855 * * *, and June 9, 1863 * * * with the said Nez Perce Tribe or bands of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho

and Oregon, and more particularly as to the following claims: * * *

* * * * *

3. Claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian Reservation lands in Idaho prior to the treaty of June 9, 1863, and its approval or ratification by the Senate on April 17, 1867 * * * ceding such lands to the United States, such claim, in any event, not to exceed one-eighth of the amount of gold so mined and removed: *Provided*, That this Act shall not be construed as creating any rights which may be made the basis of a legal or equitable cause of action but shall only authorize the said Nez Perce Tribe of Indians to present to the United States Court of Claims for adjudication such legal rights and claims, if any, which may exist under the treaties and agreements mentioned in this Act.

Article II of the treaty of June 11, 1855, 12 Stat. 957, 958, established a reservation for the Nez Perce tribe of Indians and went on to provide that—

All * * * [such] tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon said

Reservation without permission of the tribe
and the superintendent and agent; * * *

STATEMENT

Petitioner filed a petition in the court below claiming, *inter alia*, that it was entitled to recover from the United States \$3,200,000 on account of gold mined on its reservation and removed by white men up to the time of negotiation of the treaty of June 9, 1863 (R. 10-11).¹ The Court of Claims found that in 1860 gold was discovered on land "alleged to be within the lands reserved by the treaty of 1855";² that white men, without permission, established settlements thereon and extracted a large quantity of gold; and that efforts made by the Government to exclude the whites were unsuccessful (R. 15). The court concluded as a matter of law that petitioner was not entitled to recover

¹ In its findings (R. 15) and opinion (R. 20) the Court of Claims referred to the petitioner's claim as covering the period up to the agreement of May 1, 1893, ratified by Congress in the Act of August 15, 1894, c. 290, 28 Stat. 286, 326-332. As the jurisdictional act and the petition in that court disclose, the reference to the 1893 agreement was inadvertent.

² It is to be noted that the court below did not find that the gold sites were within the reservation. The 1855 treaty established as the eastern boundary of the reservation "the spurs of the Bitter Root Mountains." 12 Stat. 957-958. In the Court of Claims the Government contended that this description meant the western ends of the "spurs" and hence that the gold sites were outside the reservation (see R. 12A). In deciding the case the court found it unnecessary to pass upon this contention.

the value of any gold removed (R. 15), and entered judgment accordingly (R. 22-23).

ARGUMENT

The treaty of 1855 provided that a reservation should be set aside for the Nez Perce Tribe exclusively and that, except with permission, no white man should reside on it. Petitioner contends (Pet. 3, 6, 7-8) that "under recognized rules of international treaty interpretation" these provisions render the United States liable for the value of gold mined and removed from the alleged reservation lands by white men who were there without permission. As sole support for its contention, petitioner cites (Pet. 7-8) commentaries and state papers dealing with the measure of protection due to aliens from the sovereign within whose jurisdiction they are sojourning. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), c. V, secs. 86, 87, pp. 213-219; Hall, *International Law* (7th ed. 1917), Part II, c. IV, sec. 65, pp. 226-232; Moore, *International Arbitrations* (1898), Vol. 2, pp. 1653-1655 (Case of Ruden & Co.), Vol. 3, pp. 2456-2461 (Case of de Brissot), pp. 3039-3043 (Wipperman's Case); *Foreign Relations of the United States* (1904), pp. 352-369, 657-677.

These authorities are not in point. The rule which they announce—that a sovereign is justified under certain circumstances in seeking indemnity from a foreign government for injuries done in the

foreign country to the persons or property of citizens of the complaining sovereign—does not depend on treaty but obtains even in the absence of treaty relations between governments.³ Consequently, it does not aid in interpretation of the provisions of the Nez Perce treaty here involved.

As the court below well stated, the provision of Article II against the settlement of whites on the Nez Perce reservation merely emphasized the exclusive character of the Indians' right to enjoyment of the lands reserved (R. 20-21). This provision at most imported an undertaking by the United States to perform the appropriate govern-

³ It may well be doubted whether the rule invoked has any application to Indian tribes. While, as petitioner states (Pet. 7), an Indian tribe can make treaties with the United States (*Worcester v. Georgia*, 6 Pet. 515, 559-560), Indian tribes are not recognized in international law as independent nations. 1 Hyde, *International Law* (1922), sec. 10, p. 19. In *Cherokee Nation v. Georgia*, 5 Pet. 1, this Court, speaking through Chief Justice Marshall, said (p. 17): "They may, more correctly, perhaps, be denominated domestic dependent nations. * * * They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility." Accord, *Holden v. Joy*, 17 Wall. 211, 242; *Jones v. Meehan*, 175 U. S. 1, 10.

In any event, application of the rule here would not make the United States liable for the mining and removal of gold from the reservation but only for injuries sustained by Nez Perce Indians while in American territory outside the reservation—"abroad," from the Indians' standpoint.

mental function of the dominant sovereign of protecting the tribe in possession of its property through available police measures and by affording judicial redress against wrongdoers (R. 21).⁴ No guaranty by the Government, that it will respond in damages to the Indians in the event of private trespasses on the reservation, should be implied. Cf. *Leighton v. United States*, 161 U. S. 291, 296; *Blackfeet et al. Nations v. United States*, 81 C. Cls. 101, 119-123. And in any event the Government's obligation under Article II is not one of law that is judicially cognizable.

CONCLUSION

The decision of the Court of Claims is correct, and no conflict is presented. It is therefore respectfully submitted that the petition should be denied.

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MAY 1942.

⁴ Petitioner in its petition in the Court of Claims (R. 10-11) made no allegation that the United States either instigated or connived at the trespasses complained of. The court below found, on the contrary, that the Government had endeavored to exclude the whites from the reservation but that its efforts had been unsuccessful (R. 15).